Supreme Court, U.S.
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No. 95-1954

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RICHARD HOPEWELL,

Petitioner,

v.

MIDCONTINENT BROADCASTING CORPORATION d/b/a KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG, JOHN DOE A, JOHN DOE B, JOHN DOE D and JOHN DOE E,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

BRIEF IN OPPOSITION

Timothy M. Gebhart
Counsel of Record for Respondents
DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.
513 S. Main Avenue
P.O. Box 1030
Sioux Falls, SD 57101-1030
(605)336-2880

QUESTIONS PRESENTED

1. Is the Petition for Writ of Certiorari timely?

2. Does the Court have jurisdiction over the issues presented by the Petition for Writ of Certiorari?

3. Does this case present issues appropriate for this Court's review under a writ of certiorari?

LIST OF PARTIES

Petitioner is Richard Hopewell, an attorney whose license to practice law was suspended due to his actions in the election giving rise to this litigation.

Respondent Midcontinent Broadcasting Corporation is a wholly owned subsidiary of Midcontinent Media, Inc. Neither corporation is publicly held. At the times relevant to this lawsuit, Midcontinent Broadcasting owned and operated KELO TV, a television station in Sioux Falls, S.D. Respondents Steve Hemmingsen and Jessica Armstrong are reporters for KELO. The John Doe defendants have never been identified or served with process.

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To the Supreme Court
Of the State of South Dakota

BRIEF IN OPPOSITION

Respondents Midcontinent Broadcasting Corporation, Steve Hemmingsen and Jessica Armstrong request the Court deny the Petition for Writ of Certiorari seeking review of a decision of the South Dakota Supreme Court. That decision is reported at 538 N.W.2d 780. For the Court's convenience, citations to the South Dakota Supreme Court's opinion will be to the

appendix to the Petition for Writ of Certiorari.[1]

STATEMENT OF JURISDICTION

This Court does not have jurisdiction because the case does not present issues reviewable under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

In the spring of 1978, Petitioner was arrested, stark naked, in a Sioux Falls, S.D., drug store. He was placed under arrest for attempted rape by local police. Petitioner ran for state judicial office in 1990. During the campaign, his arrest was the subject of coverage by local news media. Respondents broadcast news stories about the 1978 events and arrest. Within two weeks, Petitioner sued them for libel.

During the course of the litigation, Petitioner attempted to obtain the identify of confidential sources used in preparing the stories. The state trial judge ruled the reporters had a qualified privilege under state law not to disclose their sources. The judge also ruled on three occasions that Petitioner had not made the showing necessary to defeat the qualified privilege. In January 1994, the trial court granted summary judgment to Respondents. The trial court's rulings were affirmed by the South Dakota Supreme

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[1]Petitioner has since filed yet another corrected Petition. All citations to the Petition are to the one docketed by the Clerk on June 3, 1996. None of the three Petitions complies with Supreme Court Rule 33.

Court in October 1995. Petitioner seeks review of that decision.

ARGUMENT

Rule 15.1 mandates counsel bring misstatements of fact to the Court's attention. Misstatements permeate the Petition. To correct them all would require more pages than the rules allow.

The most blatant distortion is the first sentence of the Statement of the Case. Petitioner asserts that on May 28, 1978, he was detained by police "for an official of record reason other than an arrest for a criminal offense." Petition at 5. This is not true. When Petitioner was placed in custody the officer filled out an "ARREST REPORT" stating he was "arrested" for the "offense" of "Attempted Rape." In reproducing a case report at Page 11A of the Petition, Petitioner deletes the text of the report, which states, among other things, that he was "lodged on attempted rape charges." The police officers testified Petitioner was arrested for attempted rape. Deposition of Glenn Rivers at 20, 21-22, 24, 29, 30-31, 32-33, 48, 49, 50; Deposition of William Dunker at 26. Petitioner simply wants to ignore what actually happened.

Petitioner's version of the procedural history of his lawsuit is likewise so divorced from the truth as to appear to be a product of delusion. Suffice it to say that the South Dakota Supreme Court specifically noted the trial judge "bent over backwards" to allow Hopewell to present his case. Petition at 10A.

I. THE PETITION IS UNTIMELY.

Petitioner attempted to file his Petition for Writ of Certiorari on or about March 16, 1996. The Petition did not comply with the rules. By letter dated March 27, it was returned to Petitioner for correction pursuant to Supreme Court Rule 14.5. That rule provides: "A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely." (Emphasis added).

The cover letter attempting to transmit the so-called corrected Petition[2] was dated May 28, 1996. As a result, it was not received until after that date and the Petition was untimely.

II. THE JURISDICTIONAL GROUNDS FOR A WRIT OF CERTIORARI ARE NOT MET.

The Petition asks this Court to review a decision of the South Dakota Supreme Court. This Court's power to exercise its jurisdiction in that respect is limited. This Court may exercise jurisdiction under a writ of certiorari only when (1) the validity of a treaty or statute of the United States is drawn into question, (2) a state statute is claimed to be repugnant to the United States Constitution or laws, or (3) federally granted rights or privileges are claimed to be affected. 28 U.S.C. § 1257(a). Similarly, this Court's rules indicate certiorari is to be granted to review a decision of a state

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[2]The new petition raises issues not presented in the first petition.

court of last resort that involves important questions of federal law. Sup. Ct. R. 10(b), (c). Review of the decision below shows these situations are not presented.

Plaintiff has narrowed the issues from 30 at the state level, Appendix at 7A, to 10 here. The fact is the South Dakota Supreme Court addressed two issues. The first was whether journalists have a qualified privilege under South Dakota law to refuse to disclose confidential sources of information. *Id.* at 7A-9A. Matters of privilege in actions under state law are issues of state law. *Cf.* Fed. R. Evid. 501 (when a federal court hears a civil action in which state law provides the rule of decision, "the privilege of a witness . . . shall be determined in accordance with State law"). This Court has no authority to review state determinations of purely state law. *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). *See also Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6 (objections to a state supreme court's application of state law does not raise a federal question appropriate for review by this Court). Thus, the South Dakota Supreme Court's recognition of a qualified reporter's privilege is not subject to review by a writ of certiorari.

The other issue addressed by the South Dakota Supreme Court was whether Petitioner was afforded rights granted him by the South Dakota Constitution. Petition at 9A-10A. In ruling on his due process claims, the Court said:

> Apparently, Hopewell equates the "open courts" provision of Section 20 of Article VI of the South Dakota Constitution with winning. The court was open to Hopewell and his suit. Every case has a loser and Hopewell lost this one.

Id. at 10A. Plainly, the decision was predicated on application of the state constitution. Petitioner himself concedes that his claimed federal questions "were never of record adjudicated by the state trial and appellate courts in the action at bar." Petition at 23. "[B]y invoking a state constitutional provision, a state court immunizes its decision from review by this Court." *Payton v. New York*, 445 U.S. 573, 600 (1980). If, as here, a state court decision indicates clearly and expressly that it is based on bona fide separate, adequate and independent state grounds, this Court will not review the decision. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

Finally, a comparison of the issues listed in Petitioner's brief to the South Dakota Supreme Court and his Petition to this Court reveals that only Issues I, IX and X were raised before the South Dakota Supreme Court. This Court will not address claims not raised below. *See Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992). As a result, this Court has no jurisdiction to address Issues II, III, IV, V, VI, VII and VIII.

III. PETITIONER'S CLAIMS LACK MERIT.

Assuming *arguendo* that this Court can address Petitioner's due process claim, it is without merit. The fundamentals of due process are notice and an opportunity to be heard. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). The South Dakota Supreme Court noted that "Hopewell was given every opportunity to be heard." Petition at 10A. There is no doubt of this. The trial court record is more than 700 pages, there were seven separate transcripts and at least five hearings were held. *Id.* Petitioner served discovery requests; filed numerous motions, affidavits and pleadings; took depositions; and was represented and/or appeared at each hearing. Any claimed denial of due process is ludicrous.

This Court also must not lose sight of the fact this is a libel action. A defamation plaintiff must establish that the statements at issue are false. S.D. Const., art. VI, § 5 ("In all trials for libel . . . the truth . . . shall be a sufficient defense"). In fact, because Petitioner was a candidate for office, the defense of truth is constitutionally required. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490-91 (1975). The South Dakota Supreme Court declared that what Respondents broadcast was true. Petition at 6A, 9A, n.8. Numerous courts have recognized the chilling and devastating effect prolonged libel litigation can have on first amendment interests. *See, e.g., Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 853 (8th Cir. 1979);

Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970) and cases cited therein. Respondents have borne the expense of nearly six years of litigation for broadcasting true statements about a candidate for judicial office. It is time for the travesty to end.

CONCLUSION

Respondents request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Timothy M. Gebhart
Counsel of Record for Respondents
DAVENPORT, EVANS, HURWITZ
& SMITH, L.L.P.
513 S. Main Avenue
P.O. Box 1030
Sioux Falls, SD 57101-1030
(605)336-2880